

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X	
In re	:
	:
	:
REFCO. INC. et al.,	:
	:
Debtors.	:
	:
----- X	
TONE N. GRANT,	:
	:
	:
Plaintiff,	:
	:
	:
-against-	:
	:
ILLINOIS NATIONAL INSURANCE	:
COMPANY AND NATIONAL UNION FIRE	:
INSURANCE COMPANY OF PITTSBURGH,	:
PA.,	:
	:
Defendants.	:
----- X	

**REPLY DECLARATION OF KEVIN J. WINDELS IN FURTHER
SUPPORT OF ILLINOIS NATIONAL INSURANCE
COMPANY'S MOTION TO WITHDRAW THE REFERENCE**

KEVIN J. WINDELS, an attorney duly admitted to practice before the Courts of the State of New York and the United States District Court for the Southern District of New York, hereby declares the following statements to be true under the penalties of perjury:

1. I am a member of the firm D'Amato & Lynch, LLP, attorneys for defendants, Illinois National Insurance Company ("Illinois National").¹

2. This Declaration is submitted in further support of Illinois National's motion to withdraw the reference.

3. In support of its motion, Illinois National presents certain documents which are referred to in its reply memorandum of law.

4. Attached as Exhibit 8 is a true copy of selected pages of the transcript of the hearing before the Honorable Robert D. Drain, U.S.B.J. on March 20, 2008, in this matter concerning plaintiff's motion for preliminary injunction to advance defense costs.

5. Attached hereto as Exhibit 9 is a true copy of the Order of the Honorable John G. Koeltl, U.S. District Judge for the Southern District of New York dated October 5, 2007 in the actions entitled Axis Reinsurance Company v. Phillip Bennett, et al., Case Nos. M-47 (JGK) and Adv. Proceeding No. 07-1712.

6. Attached hereto as Exhibit 10 is a true copy of the Limited Objection to Arch Insurance Company's Motion to Withdraw Reference to the Bankruptcy Court dated May 13, 2008 filed by counsel for all of the plaintiffs in the action entitled Joseph Murphy, et al. v. Allied World Assurance Company, et al. 08 Civ. 4105 (GEL) in U.S. District Court for the Southern District of New York.

¹ Pursuant to a Stipulation and Order of Dismissal So Ordered on April 11, 2008 National Union Fire Insurance Company of Pittsburgh, Pa. has been dismissed from this case.

7. Attached hereto as Exhibit 11 is a true copy of the Consent to Allied World Assurance Co. (U.S.) Inc.'s Motion to Withdraw Reference from the Bankruptcy Court dated May 13, 2008 filed by counsel for all plaintiffs in the action entitled Joseph Murphy, et al. v. Allied World Assurance Company, et al. 08 Civ. 4196 (GEL) in U.S. District Court for the Southern District of New York.

8. Attached hereto as Exhibit 12 is a true copy of the Order of the Honorable Gerard E. Lynch, U.S. District Judge for the Southern District of New York dated June 4, 2008 in action entitled Joseph Murphy et al. v. Allied World Assurance Company (U.S.), Inc. and Arch Insurance Company, 08 Civ. 4105 (GEL) and 08 Civ. 4196 (GEL).

Dated: New York, New York
June 16, 2008

s/
Kevin J. Windels

Exhibit 8

ORIGINAL

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In Re:

06-60006 (RDD)

4 REFCO, INC.,

One Bowling Green
New York, New York
March 20, 2008

5 Debtor.

6 GRANT,

08-01129

7 Plaintiff,

8 v.

9 ILLINOIS NATIONAL INSURANCE COMPANY,
et al.,

10 Defendants.

11 TRANSCRIPT OF MOTION AND
12 RELIEF FROM AUTOMATIC STAY
13 BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

14 APPEARANCES:

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20 Court Transcriber:

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21 REGENCY REPORTING, INC.

22 Certified Court Reporters & Videographers

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25 www.regencyreporting.net

1-866-268-7866

1 THE COURT: Grant v. Illinois National.

2 MR. EISEN: Good morning, Your Honor. Norman Eisen,
3 counsel for Tone Grant.

4 Your Honor, we want to thank the Court again for hearing
5 this matter on an expedited basis as the Court has accommodated us
6 on previous occasions with urgent papers relating to insurance
7 issues.

8 As the Court well knows and unless Your Honor requests
9 otherwise I will not recite the whole procedural history of the
10 insurance litigation before Your Honor. We have previously
11 litigated the Maine Tower of Insurance Axis [sic]. The gist of
12 that case was Axis' argument that coverage exclusions needed to be
13 adjudicated before advancement and Your Honor held the opposite was
14 true that the advancement issue goes first and the exclusions must
15 wait for later. We have here a separate Tower of Insurance,
16 Illinois National, but essentially the same argument. The
17 provisions of the Illinois National policy which is attached at
18 Exhibit A to the complaint provides on the cover page that in all
19 events the insurer must advance defense cost payments pursuant to
20 the terms herein prior to the final disposition of a claim. A
21 claim is defined at Page 2 of the policy as a written demand for
22 monetary or non-monetary relief or a civil, criminal,
23 administrative, regulatory or arbitration proceeding. So we have
24 at issue here both coverage for the civil cases in which Mr. Grant
25 is a party and also the criminal matters. The language as we'll

1 THE COURT: So S-4 is against him?

2 MR. EISEN: Yes, S-4 is against him; correct.

3 Your Honor, as you know, under the Tyco case if there's
4 even --

5 THE COURT: And you're saying in S-4 there are claims
6 other than conspiracy claims against him?

7 MR. EISEN: I'm saying that the government has added a
8 particular variety of allegations that were not in S-3 and I have -
9 - but even looking at S-3, you know, as the Court correctly notes,
10 it's not entirely a conspiracy indictment and as the Tyco case
11 teaches, if there's even one allegation or one count or one aspect
12 the insurer is required to defend the whole and it is a heavy
13 burden, Your Honor, and we submit that the additional cases -- the
14 Great American case, the Sun Times case -- demonstrate that it is
15 by no means automatic, we will have the right to litigate this
16 coverage exclusion to demonstrate that notwithstanding the guilty
17 plea that the coverage exclusion does not apply. We'll have the
18 right to discovery, we'll have the right to question whether Mr.
19 Bennett may have pled to this for other reasons to establish
20 independent evidence. I'll remind the Court that part of that
21 discovery process and that issue coming up on summary judgment --
22 and this is the underlying philosophical foundation of the Worldcom
23 cases -- we will be able to take discovery on issues like whether
24 the application was considered prior to the issuance of the policy.
25 We'll be able to get the underlying documents, we'll be able to

1 understand the policies and procedures of the insurers. Those are
2 all the reasons that these exclusion issues are deferred even when
3 there are guilty pleas -- generally deferred until after the
4 advancement question.

5 THE COURT: Does it matter that the application says
6 that it's material?

7 MR. EISEN: Of course it matters, Your Honor, but it is
8 not, we would submit, dispositive. We need to analyze --

9 THE COURT: Is there any case law on that point?

10 MR. EISEN: Your Honor, I think Worldcom stands for the
11 proposition. I believe it's Worldcom that says that materiality is a
12 legitimate subject of discovery that one is entitled to look at
13 their practices and procedures on this question.

14 THE COURT: But I don't remember, was there an
15 acknowledgement in the policy that this was material in Worldcom?
16 I just don't remember.

17 MR. EISEN: Your Honor, I do not -- I'm not able to
18 answer that.

19 THE COURT: Okay.

20 MR. EISEN: I do not see the acknowledgement on first
21 glance of Worldcom but I certainly don't have the whole file
22 before me -- the underlying documents of Worldcom.

23 Of course, Your Honor, the sufficiently serious
24 questions going to the merits is not the only part of the test, the
25 balance of harms is also significant and the harms here of having

C E R T I F I C A T I O N

I certify that the foregoing is a transcript from an electronic sound recording of the proceedings in the above-entitled matter taken on March 20, 2008, except where, as indicated, the Court has modified the transcript.

Carla Nutter^G

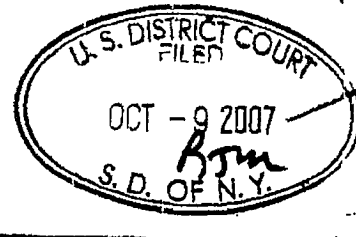
Carla Nutter

3/24/08

Date

Exhibit 9

DOC # 468



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AXIS REINSURANCE COMPANY,

Plaintiff,

- against -

Case. No. M-47 (JGK)

PHILLIP R. BENNETT, LEO R. BREITMAN,
NATHAN GANTCHER, TONE GRANT, DAVID V.
HARKINS, SCOTT L. JAECKEL, DENNIS A.
KLEJNA, THOMAS H. LEE, SANTO C.
MAGGIO, JOSEPH MURPHY, RONALD L.
O'KELLEY, SCOTT A. SCHOEN, WILLIAM M.
SEXTON, GERARD SHERER, PHILIP
SILVERMAN, ROBERT C. TROSTEN, AND
DOES 1 to 10,

ORDER

Defendant(s).

In re:
REFCO, INC., et al.,
Debtors.

Chapter 11
Case No. 05-60006 (RDD)
(Jointly Administered)

AXIS REINSURANCE COMPANY,

Plaintiff,

- against -

Adv. Proc. No. 07-1712

PHILLIP R. BENNETT, LEO R. BREITMAN,
NATHAN GANTCHER, TONE GRANT, DAVID V.
HARKINS, SCOTT L. JAECKEL, DENNIS A.
KLEJNA, THOMAS H. LEE, SANTO C.
MAGGIO, JOSEPH MURPHY, RONALD L.
O'KELLEY, SCOTT A. SCHOEN, WILLIAM M.
SEXTON, GERARD SHERER, PHILIP
SILVERMAN, ROBERT C. TROSTEN, AND
DOES 1 to 10,

Defendant(s).

MICROFILM

OCT 29 2007 - 12 00 PM

TONE N. GRANT, ROBERT C. TROSTEN, AND
PHILLIP R. BENNETT,

Adv. Proc. No. 07-2005
(RDD)

Plaintiffs,

- against -

AXIS REINSURANCE COMPANY,

Defendant.

LEO BREITMAN, et al.,

Plaintiffs,

Adv. Proc. No. 07-2032
(RDD)

- against -

AXIS REINSURANCE COMPANY,

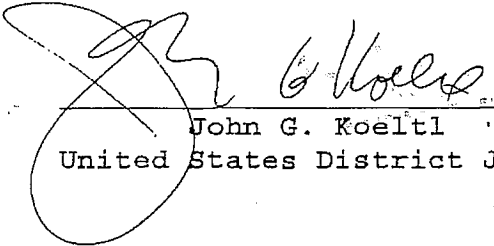
Defendant.

JOHN-G. KOELTL, District Judge:

//
For the reasons stated on the record at the hearing held on
October 5, 2007, Axis' motion to withdraw the reference is
denied without prejudice to re-file after the Bankruptcy Court
has decided the pending motions for summary judgment. //

SO ORDERED.

Dated: New York, New York
October 5, 2007



John G. Koeltl
United States District Judge

Exhibit 10

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re
REFCO INC., et al.,

Debtors.

Case No. 08-04105

(Referred to Judge Gerard E. Lynch)

[caption continued on next page]

**LIMITED OBJECTION TO ARCH INSURANCE COMPANY'S
MOTION TO WITHDRAW REFERENCE TO THE BANKRUPTCY COURT**

-----X	
In re	:
REFCO INC., et al.,	:
Debtors.	:
	:
	:
-----X	
JOSEPH MURPHY, WILLIAM M. SEXTON, DENNIS	:
A. KLEJNA, GERALD SHERER, PHILIP	:
SILVERMAN, RICHARD N. OUTRIDGE, TONE	:
GRANT, LEO R. BREITMAN, NATHAN GANTCHER,	:
DAVID V. HARKINS, SCOTT L. JAECKEL, THOMAS	:
H. LEE, RONALD L. O'KELLEY, AND SCOTT A.	:
SCHOEN,	:
Plaintiffs,	:
v.	:
	:
ALLIED WORLD ASSURANCE COMPANY (U.S.),	:
INC. and ARCH INSURANCE COMPANY,	:
	:
Defendants, and	:
	:
JOHN D. AGOGLIA, EDWIN L. COX, SUKHMEET	:
DHILLON, THOMAS H. DITTMER, STEPHEN	:
GRADY, THOMAS HACKL, ERIC G. LIPOFF, PETER	:
MCCARTHY and FRANK MUTTERER.	:
	:
Nominal Defendants.	:
-----X	

Chapter 11
Case No. 05-60006 (RDD)
(Jointly Administered)

Adv. Proc. No. 08-01133 (RDD)

Plaintiffs William M. Sexton, Gerald Sherer, Philip Silverman, Joseph Murphy, Richard N. Outridge, Leo R. Breitman, Nathan Gantcher, David V. Harkins, Scott L. Jaeckel, Thomas H. Lee, Ronald L. O'Kelley, Scott A. Schoen, Dennis A. Klejna and Tone N. Grant (collectively, the "Insureds"), each a former officer or director of Refco, Inc. ("Refco"), or one of its direct or indirect subsidiaries, hereby submit this limited objection to Arch Insurance Company's ("Arch") motion to withdraw the reference to the Bankruptcy Court (the "Motion"), and respectfully represent:

1. Arch and Allied World Assurance Co. (U.S.), Inc. ("Allied World") are defendants in the above-captioned adversary proceeding (the "Adversary Proceeding"), commenced by the Insureds in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). In the Adversary Proceeding, the Insureds are seeking a determination that the excess insurance policies issued by Allied World and Arch cover certain losses incurred by the Insureds in connection with litigations stemming from the collapse of Refco.

2. On April 30, 2008, Allied World filed a motion to withdraw the reference to the Adversary Proceeding so that such case could be heard by this Court. The Insureds are consenting to Allied World's motion¹ because separate coverage litigation involving two of Refco's other excess D&O insurance carriers, Axis Reinsurance Company and XL Specialty Insurance Company are already pending before this Court.² The Insureds believe that all the coverage litigations involve many common issues and that withdrawal of the reference is consistent with, and will promote, judicial economy and fairness.

3. On May 1, 2008, Arch filed the Motion seeking to withdraw the reference to the Adversary Proceeding, but only as to Arch. The Insureds object to the Motion to the extent that it would not result in the withdrawal of the reference for the entire Adversary Proceeding.³

¹ Filed contemporaneously herewith, the Insureds have submitted their consent to Allied World's motion to withdraw the reference.

² *XL Specialty Ins. Co. v. Agoglia*, No. 08-CV-3821 (S.D.N.Y. Apr. 22, 2008); *Axis Reinsurance Co. v. Bennett*, No. 07-CV-7924 (S.D.N.Y. Sept. 7, 2007) and Adv. Pro. No. 07-01712 (Bankr. S.D.N.Y. May 23, 2007), reference withdrawn, No. 08-CV-3242.

³ Arch recently sent a letter to this Court, dated May 9, 2008, in which it conceded that the Motion would be moot if the Court granted the motion to withdraw the reference filed by Allied World. Notably, despite the Insureds' request to do so, Arch did not withdraw the Motion even though it had been advised that the Insureds were consenting to Allied World's motion.

4. In the Motion, Arch accuses the Insureds of forum shopping on the grounds that the Insureds commenced the Adversary Proceeding in the Bankruptcy Court when they had previously objected to Arch's intervention in the insurance coverage adversary proceeding commenced by Axis (the "Axis Case").

5. Arch's accusations are baseless. The Insureds commenced the Adversary Proceeding in the Bankruptcy Court because that court was the proper initial forum for a controversy involving assets of Refco's chapter 11 estates – the various excess insurance policies.⁴ Moreover, the Bankruptcy Court already had extensive exposure to the issues concerning the advancement of defense costs, the payment of which is mandated by the primary D&O policy to which the excess policies of Axis, Allied World, and Arch follow form. In any event, Arch had been advised before it filed the Motion that the Insureds were consenting to withdraw the reference to the Adversary Proceeding so that this Court could consider all the coverage issues together.⁵

6. Certain of the Insureds opposed Arch's intervention in the Axis Case because Arch sought to inject facts and issues into that adversary proceeding that were beyond the scope of the issues before the Bankruptcy Court at that time. Specifically, Arch sought to have the Bankruptcy Court separately construe its policy with respect to advancement of defense costs at a time when no demand for advancement had been made of Arch. As such, the Insureds were

⁴ The tower of Refco's D&O insurance is as follows: (1) U.S. Specialty Insurance Company (\$10 million primary coverage); (2) Lexington Insurance Company (\$7.5 million excess of \$10 million); (3) Axis Reinsurance Company (\$10 million excess of \$17.5 million); (4) Allied World Assurance Company (\$12.5 million excess of \$27.5 million); (5) Arch Insurance Company (\$10 million excess of \$40 million); and (6) XL Insurance Company (\$20 million excess of \$50 million).

⁵ Consistent with that position, the Insureds have filed a motion seeking to dismiss or stay an action commenced by Arch in New York State Supreme Court on the issue of coverage so that the common coverage issues as to Allied World and Arch can proceed together.

well within their right to oppose Arch's motion to intervene, and the fact that the Insureds now seek to consolidate the coverage disputes in *this Court* does not constitute forum shopping.

7. Arch's accusations that the Insureds are forum shopping are further contradicted by the fact that the Insureds are consenting to Allied World's motion to withdraw the reference as to the entire Adversary Proceeding. The Insureds believe that it would be most efficient for all coverage related disputes with Refco's D&O insurance carriers to proceed in this Court.

WHEREFORE, the Insureds respectfully request that this Court enter an order granting Allied World's motion to withdraw the reference to the Bankruptcy Court for the Adversary Proceeding, denying Arch's motion insofar as it seeks to withdraw the reference only for the claims against Arch, and granting such other relief as is just.

Dated: May 13, 2008

Respectfully submitted,

/s/ Michael F. Walsh

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re :
REFCO INC., et al., :
Debtors. :
: :
-----X

Case No. 08-04196
(Referred to Judge Gerard E. Lynch)

[caption continued on next page]

**CONSENT TO ALLIED WORLD ASSURANCE CO. (U.S.) INC.'S
MOTION TO WITHDRAW REFERENCE FROM THE BANKRUPTCY COURT**

-----X	
In re	:
REFCO INC., et al.,	:
Debtors.	:
	:
-----X	
JOSEPH MURPHY, WILLIAM M. SEXTON, DENNIS	:
A. KLEJNA, GERALD SHERER, PHILIP	:
SILVERMAN, RICHARD N. OUTRIDGE, TONE	:
GRANT, LEO R. BREITMAN, NATHAN GANTCHER,	:
DAVID V. HARKINS, SCOTT L. JAECKEL, THOMAS	:
H. LEE, RONALD L. O'KELLEY, AND SCOTT A.	:
SCHOEN,	:
Plaintiffs,	:
v.	:
	:
ALLIED WORLD ASSURANCE COMPANY (U.S.),	:
INC. and ARCH INSURANCE COMPANY,	:
	:
Defendants, and	:
	:
JOHN D. AGOGLIA, EDWIN L. COX, SUKHMEET	:
DHILLON, THOMAS H. DITTMER, STEPHEN	:
GRADY, THOMAS HACKL, ERIC G. LIPOFF, PETER	:
MCCARTHY and FRANK MUTTERER.	:
	:
Nominal Defendants.	:
-----X	

Chapter 11
Case No. 05-60006 (RDD)
(Jointly Administered)

Adv. Proc. No. 08-01133 (RDD)

Plaintiffs William M. Sexton, Gerald Sherer, Philip Silverman, Joseph Murphy, Richard N. Outridge, Leo R. Breitman, Nathan Gantcher, David V. Harkins, Scott L. Jaeckel, Thomas H. Lee, Ronald L. O'Kelley, Scott A. Schoen, Dennis A. Klejna, and Tone N. Grant, each a former officer or director of Refco, Inc., or one of its direct or indirect subsidiaries, hereby consent to the withdrawal of the reference of the above-captioned adversary proceeding from the United States Bankruptcy Court for the Southern District of New York, as requested by Allied World Assurance Company (U.S.), Inc. in its Motion to Withdraw the Reference from the Bankruptcy Court, dated April 30, 2008 [Dkt. No. 1].

Dated: May 13, 2008

Respectfully submitted,

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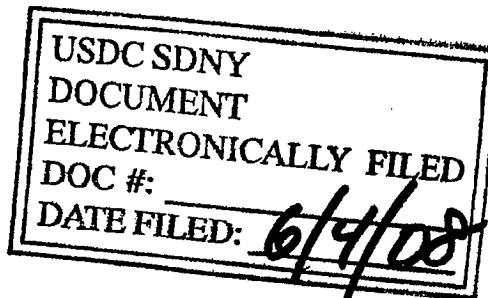
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Attorneys for Plaintiff Philip Silverman

Exhibit 12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JOSEPH MURPHY et al.,

Plaintiffs,

-against-

ALLIED WORLD ASSURANCE
COMPANY (U.S.), INC. and ARCH
INSURANCE COMPANY

Defendants.

08 Civ. 4105 (GEL)

08 Civ. 4196 (GEL)

ORDER

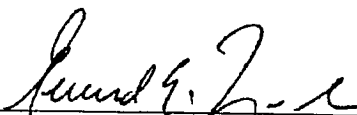
On April 24, 2008, defendant Arch Insurance Company ("Arch") was added, through the filing of an amended complaint, as a defendant in an adversary proceeding entitled Murphy et al. v. Allied World Assurance Company (U.S.), Inc., et al., Adv. Proc. No. 08-01133 (RDD), commenced in connection with the In re Refco, et al. bankruptcy proceeding, Case No. 05-60006 (RDD). On May 1, 2008, Arch filed a motion to withdraw the reference only as to the claims made against it in the adversary proceeding. (Doc. #1, 08 Civ. 4105.)

On May 2, 2008, Allied World Assurance Company (U.S.), Inc. ("AWAC"), Arch's co-defendant in the adversary proceeding, filed a motion to withdraw the reference as to the entire adversary proceeding. (Doc. #1, 08 Civ. 4196.) Plaintiffs in the adversary proceeding consent to the withdrawal of the reference as to the entire adversary proceeding. Arch has also informed the Court that "it does not oppose the relief sought by AWAC" and acknowledges that "granting AWAC's motion would render Arch's motion moot." (Ltr. from John H. Eickemeyer to the Court, May 9, 2008, at 1-2.)

Having carefully considered the parties' submissions, it is hereby ORDERED that AWAC's motion to withdraw the reference as to the entire adversary proceeding, Adv. Proc. No. 08-01133 (RDD), is granted. (Doc. #1, 08 Civ. 4196.) Arch's motion to withdraw the reference as to the claims asserted against it is denied as moot. (Doc. #1, 08 Civ. 4105.)

SO ORDERED.

Dated: New York, New York
June 4, 2008


GERARD E. LYNCH
United States District Judge

AFFIDAVIT OF SERVICE VIA E-MAIL AND OVERNIGHT MAIL

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

STEPHEN F. WILLIG, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in Hazlet, New Jersey.

On June 16, 2008, deponent served the within **REPLY DECLARATION OF KEVIN J. WINDELS IN FURTHER SUPPORT OF ILLINOIS NATIONAL INSURANCE COMPANY'S MOTION TO WITHDRAW THE REFERENCE** upon:

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the attorneys for the plaintiff and the plan administrator herein at the e-mail address designated and agreed to in writing by said person for that purpose by electronically delivering a true copy thereof, and also at the address(es) designated by said attorney(s) for that purpose by leaving a true copy of same enclosed in a pre-paid properly addressed wrapper for UPS overnight delivery.

s/ Stephen F. Willig

STEPHEN F. WILLIG

Sworn to before me this
16th day of June, 2008

s/ Kevin J. Windels

NOTARY PUBLIC